United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1369

To be argued by
JOHN L. POLLOK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1369

UNITED STATES OF AMERICA,
Appellee,

—v.—

BARBARA PARNESS,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT, BARBARA PARNESS

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BRIEF OF APPELLANT, BARBARA PARNESS

Issues Presented for Review

1. Did the Court below err by not ordering a new trial on the basis of newly discovered evidence?

2. Did the Court below err in refusing to grant the Appellant a new trial in view of the prosecution's deliberate non-disclosure of exculpatory material and material producable under 18 U.S.C. 3500. In any event, did the court below, in view of the Government's admission of non-disclosure, err in failing to grant Appellant a hearing on the issue of deliberateness?

3. Does the failure of the prosecution to disclose certain promises made to its witness-in-chief mandate the granting of a new trial?

4. Did the prosecution's suppression of evidence which tended to exculpate the appellants require the granting of a new trial?

Preliminary Statement *

Barbara Parness appeals from an order of the United States District Court entered against her on September 29, 1975 denying a motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure to vacate the judgment of conviction entered against her on December 7, 1973 (J. 552-560).

Statement of Facts

A. The Chronology on the Motion for a New Trial

On August 2, 1973, superseding indictment 73 Cr. 750 was filed in the Southern District of New York. That indictment charged Milton Parness with acquiring control of the St. Maarten Isle Hotel and Casino (Hotel Corp.) through a pattern of racketeering in violation of Title 18 U.S.C., Sections 1961, 1962(b), and 1963 and 2 (counts 1 through 3 inclusive). Counts 4, 6 and 7 of the same indictment charged Milton Parness and Barbara Parness (hereinafter the appellant) with the interstate transportation of money which had been stolen, converted and taken by fraud in violation of Title 18 U.S.C. Sections 2314 and 2. Count 5 charged Milton Parness and the appellant with causing and inducing Allan Goberman to travel in interstate commerce pursuant to a scheme to defraud in violation of Title 18 U.S.C., Sections 2314 and 2.** (J. 6-15).

At the conclusion of the government's case, counts 2, 3, and seven were dismissed by the Court below. At the

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* Citations to the appendix herein are preceded by "J". Citations to the appendix of appellant on her direct appeal heretofore made to this Court are preceded by "A."

** Counts 4 through 7 inclusive also constituted the individual acts of racketeering which formed the pattern of racketeering charged in counts 1 through 3.

conclusion of all the evidence, Milton Parness was convicted on counts 1, 4, 5 and 6, and the appellant was convicted on counts 4, 5 and 6. On December 7, 1973, appellant was sentenced by the Court below to a term of imprisonment of two years on each count execution of which was suspended; and appellant was placed on probation for a period of three years and fined a total of $6,000.00. On June 27, 1974, appellant's conviction was affirmed in *United States* v. *Parness*, 503 F.2d 430 (2d Cir), *cert. den.*, 419 U.S. 1105 (1975).

On or about January 22, 1975, Milton Parness and the appellant moved in the United States District Court for the Southern District of New York for an Order granting a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the grounds *inter alia*, that the testimony of the prosecution's witness-in-chief was false as to material matters; that there existed evidence of material facts not yet presented and heard which required vacation of judgment of conviction and sentences in the interest of justice; and that at the time of trial, the United States Attorney knew or should have known of material evidence favorable to the defendants which was not disclosed or made available to them (J. 16-17).

In support of that application, there were submitted to the District Court *inter alia*, the affidavits of Milton Parness and Barbara Parness; three depositions given by Allan Goberman the prosecution's witness-in-chief, in a civil proceeding in the United States District Court for the District of New Jersey; and the depositions of one John Blandino given in the same civil action (J. 19-J.321).

During the subsequent course of the proceedings, counsel for the appellants submitted to the Court below a supplementary affidavit in further support of the pending Rule 33 motion (J. 326-328).

Concisely put, that affidavit indicated that on February 24, 1975, Goberman represented to the United States District Court for the District of New Jersey, in a matter pending in that Court, that the Government, through its prosecutors, had in fact, *promised* him that in return for his testimony at trial they would recover and return to him the Hotel he had lost because of the alleged criminal acts of Milton Parness and the appellant. Trial counsel further indicated that inasmuch as the prosecution never revealed, and in fact, deliberately suppressed, the existence of this promise, the defense was improperly prevented from utilizing critical and relevant impeachment evidence and as such, Milton Parness and the appellant were denied a fair trial and due process of law (J. 327).*

On or about March 4, 1975, the Government submitted its initial affidavit in opposition to the pending Rule 33 motions of Milton Parness and the appellant (J. 374 *et seq.*). The Government's position, simply put, was that the evidence described in the Parness' affidavit was neither newly discovered, nor did it contradict Goberman's trial testimony (J. 377). Soon thereafter, and before the reply brief of Milton Parness and the appellant had been received, the Government submitted a supplemental affidavit in opposition which, in substance, urged that the Government did not violate the holding of *Brady* v. *Maryland*, 373 U.S. 83 (1963) by non disclosure of the promise to Goberman and that neither a new trial nor even an evidentiary hearing to determine whether to grant such a trial was necessary (J. 389-390).

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* The litigious Mr. Goberman, commenced an additional action against the United States subsequent to the trial herein. In his complaint in that action, Goberman swears "Robert J. Cambell Esquire, Chief, Strike Force 18, Washington D.C., advised plaintiff (Goberman) that Quote: 'The Government wants to convict the racketeers who stole the Hotel away from you and have it returned to you'." The Court below totally overlooked this statement (J. 549).

On March 17, 1975, Milton Parness and the appellant replied to the contentions of the Government and again urged that a new trial was necessary and in any event, a hearing should be held by the Court below concerning the issues raised (J. 391-409).

Thereafter, by letters dated March 24, and March 25, 1975, appellants' counsel informed the Court below that it had recently become known that Mr. Goberman had instituted a *pro se* action in the United States District Court for the Eastern District of Pennsylvania against the United States of America, bearing number 73-2669. In support of his claim, Goberman had annexed a series of letters written by him and addressed to the Government prosecutors involved in various facets of the trial conducted in the Court below against Milton Parness and the appellant. These letters, it was claimed, at the very least, should have been turned over to the defense as material within the purview of 18 U.S.C. 3500 and *Brady* v. *Maryland*, *supra* (J. 411-415).

It was further urged that these letters taken together with Goberman's post-trial statements made under oath which dramatically contradicted his trial testimony and the deliberate suppression by the Government of evidence favorable to the defense, mandated a new trial and in any event, a full evidentiary hearing before the Court below in the interest of justice (J. 412).*

Four months following the receipt of these letters, the Government submitted its "second Supplemental affidavit

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* As will be discussed *infra*, Goberman's communications consisted of 26 letters all written prior to trial and for the most part addressed to the attorney in charge of the "Parness prosecution" one R. J. Campbell. Several of these letters contain highly material information which go directly to the guilt or innocence of appellant and Milton Parness. It is critical to note that Campbell's affidavit totally ignores the issues of the letters.

in opposition" to the contentions of appellants (J. 435 et seq.). Although conceding the suppression of these letters, the prosecution, in essence, urged that the letters written by Goberman "were neither 3500 nor *Brady* material, and were not required to be turned over." Annexed to the Government's supplemental response were a series of affidavits by Harold F. McGuire, Jr., John M. Dowd, Michael B. Pollack and Robert J. Campbell, all of whom were involved in some facet of the prosecution of the Parnesses. Included as exhibits to the affidavits were a series of letters written yb Goberman, a number of which pre-dated the trial and which were *concededly* never turned over to the Court below (J. 481-J. 519).*

In reply, Milton Parness and appellant once again urged that a new trial be granted or in any event an evidentiary hearing be conducted by the Court below on the grounds *inter alia* that the prosecution suppressed both *Brady* material and documents producible under 18 U.S.C. 3500.

On September 29, 1975, the District Court, (Bonsal J.) denied the motion in an opinion (J. 552 *et seq.*).

In that opinion, the Court below found that the newly discovered evidence found in Goberman's civil depositions was not sufficient to require a new trial inasmuch as the depositions revolved around Government's Exhibits 167-177 which were available at trial. The Court below further found that Goberman's concessions with respect to certain deductions and commissions due Milton Parness were not newly discovered because Parness had knowledge of these commissions at the time of trial. Parenthetically it should be recalled that at trial, Goberman maintained

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* The originals of the letters all written in handprinted capital letters appears at J. 481-519. For the convenience of the Court, we have reproduced type-written facsimiles. These appear at J. 566-J. 605.

that Parness was not due these commissions although other junketeers were entitled to them.

The Court also rejected the Appellants' contention that $139,000 constituting remittance from Parness to Goberman should have been credited to appellants. The Court reasoned that these checks were available at trial and therefore did not constitute new evidence. The Court overlooked the fact that Goberman in his civil depositions admitted, apparently for the first time, that many of those checks were filled out in his own hand and were used for his benefit. This of course is totally contrary to the prosecutions remittance-deprivation theory.

The Court below then rejected the appellants' position with respect to the promises made to Goberman and categorized Goberman's statements made in open Court in the District of New Jersey as ambiguous. Unfortunately, Judge Bonsal failed to consider Mr. Goberman's sworn statement made in a separate proceeding (see *infra* pp. 26-27) that such a promise had been made.

Finally, the Court, though assuming that the letters were 3500 material nevertheless without a hearing, rejected appellants' claims with reference to the concededly undisclosed Goberman letters holding that the letters were not directed to individuals connected with this case; that the nondisclosure was inadvertent and that the letters failed to meet the "skilled counsel test" used in this circuit.*

B. A Synopsis of the Proof of Trial**

Although this Court may be well aware of the proof offered during the course of the trial, a brief synopsis of that proof, we believe, is appropriate for an understanding of the argument which follows.

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* As will be developed infra, the Court's factual findings with respect to the letters was wholly erroneous.

** A full statement of facts in this case may be found in *United States* v. *Parness*, 503 F.2d 430, (2nd Cir., 1974).

During the course of the trial, the government contended that the defendants defrauded Allan Goberman of his 90.5% stockholdings in a large gambling casino-hotel corporation in the Netherlands Antilles. The appellants, according to Mr. Goberman, the prosecution's witness-in-chief, accomplished this by illegally diverting to their own use a part of the hotel corporation's receipts ("marker collections") and using those stolen receipts, loaned Goberman the sum of $160,000 for which Goberman pledged his entire stock interest. Thereafter, by continuing to divert or withhold part of the hotel corporation's receipts and by effectively keeping Goberman from obtaining the necessary funds, the appellants, according to the prosecution, made it impossible for Goberman to repay the loan. The defendant Parness was therefore able to foreclose on the shares and take control of the hotel and casino corporation.

It is beyond dispute that the central factual issue in this extraordinary prosecution was whether the defendants stole, converted or took by fraud $160,000 from the hotel corporation or Goberman. (This amount being a part of $350,000-$400,000 which Goberman claimed was converted.) Simply put if the appellants did not owe Goberman any money on February 4 or February 9, 1971 then they committed no crime.

C. A Synopsis of the Newly Discovered Evidence

On or about February 5, 1974, Allan Goberman, the prosecution's witness-in-chief and allegedly the victim of the defendants' wrongdoing, commenced a civil action in the United States District Court for the District of New Jersey pursuant to the provisions of Title 18 United States Code 1961 (J. 311-313). Mr. Goberman's civil action was predicated upon the defendants' conviction in the Southern District of New York. During the course of that civil proceeding, Goberman and one John Blandino were deposed by the attorneys for the defense therein.

During the course of those depositions, newly discovered evidence came to the attention of defense counsel which, we submit, reveals that Goberman committed perjury in the criminal action as to several material matters and that the prosecution had either grossly negligently or intentionally suppressed evidence favorable to the defense and wilfully failed to advise the Court and defense counsel that perjured testimony was being given.

The genesis of the new evidence consisted of Mr. Goberman's admission that substantial and legitimate deductions had to be made from the $350,000 to $400,000 amount that he had originally testified was due the casino. These deductions showed that in fact only $141,000 was due the casino and not the $350,000 to $400,000 (J. 27-35).*

In addition, the new evidence took the form of a series of concessions and admissions by Mr. Goberman that an additional $139,000 should have been credited to the appellants in computing what was legitimately owed to either the hotel corporation or to Goberman (J. 36-41).**

Wholly, separate and apart from Mr. Goberman's admissions and recantations, was the testimony of John Blandino that the government had been advised by him of the above and had made written memoranda, but had failed to disclose these facts to either the Court or defense counsel (J. 203-309).

For the reasons that follow, we submit, the Court below committed reversible error by denying the motion of Milton Parness and the appellant pursuant to Rule 33 and in any event, by denying the said motion without ordering an evidentiary hearing as to the critical and decisive issues of law and fact presented in the papers of the movants.

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* Computations have been rounded off.

** A detailed analysis of Goberman's concessions is contained in the affidavit of Milton Parness dated January 22, 1975 and the exhibits annexed thereto (J18-45).

POINT I

The Court Below Erred By Not Ordering A New Trial On The Basis Of Newly Discovered Evidence.

In affirming the judgments of conviction against Milton Parness and the appellant this Court specifically noted:

> "The record establishes that Hotel Corp. failed to receive approximately $400,000 in overdue marker accounts payable during a period when Parness was *solely responsible for an had exclusive control over marker collections . . .*
>
> *Shortly before the Goberman loan, as noted above, agents of the Internal Revenue Service seized $60,000 in cash marker collections intended for Parness . . .*
>
> In short, in the context of this record and *in view of the complete absence of any credible explanation as to the source of the funds used in connection with the Goberman loan, we fail to see how the jury could have reached any conclusion except that Parness had withheld marker collections and had used the proceeds of such collections and the trust money to acquire Goberman's interest in Hotel Corp.*" (503 F.2d 436-437, emphasis supplied).

Thus, the decision of the jury and the opinion of this Court was based upon three fundamental premises:

1.) That Goberman or the Hotel-Casino failed to receive $400,000 in marker collections;

2.) During this period Parness was solely responsible for and had exclusive control over marker collections;

3.) And as evidence of the second premise, shortly before the Goberman loan to Holzer was due, two agents of the Internal Revenue Service seized $60,000 in cash marker collections *intended for Parness.*

Assuming *arguendo* the truth of Goberman's trial testimony, the conclusions reached by this Court based on these premises were perhaps warranted. It must, of course, be further assumed that the jury credited Goberman's trial testimony as true so as to enable it to reach its verdict.

We submit, that the post-trial civil depositions of Goberman and undisclosed letters written by Goberman to agents of the Government *totally erode* the aforestated fundamental assumptions upon which this Court affirmed the judgment of conviction and presumably upon which the jury based its findings of guilt. This genre of new evidence further establishes beyond peradventure that Goberman's trial testimony was perjuriously false in numerous aspects so as to warrant a new trial as to Milton Parness and the appellant.*

As this court found, Goberman's *trial testimony* established that the Hotel Corp., in which Goberman was purportedly a major stockholder, failed to receive approximately $400,000 at a time when Parness was solely responsible for and had exclusive control over marker collections. In actuality we submit, Goberman's *post-trial*

*Although Goberman's post-trial statements concern themselves with Milton Parness, it is clear that inasmuch as this Court found that the appellant had been actively involved "in virtually every aspect of Parness' scheme to acquire Hotel Corp." the falsity of Goberman's trial testimony materially affected the appellant. In short, if there was no "scheme", as Milton Parness and the appellant claim and as Goberman's post-trial statements clearly establish, the appellant could not possibly have committed a crime.

civil depositions establish beyond peradventure that Milton Parness did not owe Goberman and/or Hotel Corp. *even one penny, let alone $400,000* Based upon the material discrepancies between Goberman's trial testimony and his post-trial statements made under oath, it becomes crystal clear that Goberman committed perjury during the course of the trial in the Court below and that the prosecution knew or should have with due diligence known of this fact. In short, it is the position of the appellant that the newly discovered evidence demonstrates nothing less than that in truth and in fact, Milton Parness owed *nothing* to Goberman and/or Hotel Corp. and that the sum of $160,000 which allegedly crossed state lines on February 4 and February 9, 1971 could not therefore have been stolen or converted from Goberman and/or his Hotel Corp. as alleged in the indictment and at trial.

Notwithstanding his trial testimony, at his civil depositions, Goberman began to significantly alter his position vis a vis the $400,000 (J. 104). Contrary to the decision by the Court below, the newly discovered evidence was Goberman's grudging admissions at the post-trial deposition that the $400,000 figure he testified to at trial was incorrect and *not* the work sheets received in evidence as Government's Exhibits 167-177.* Since Goberman's Admissions that the $400,000 figure was inaccurate were made subsequent to the trial and as such, were not available to the defense at trial, contrary to the determination of the Court below, we submit, Goberman's admissions did, as a matter of law, constitute newly discovered evi-

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* Exhibits 167-177 were of course used in those depositions but solely as a point of reference following Goberman's admissions. Similarly, those exhibits were used in the Court below as a guide. It is noteworthy that the total of the accounts receivable (e.g. gross marker pickups equals only $233,000.00 and not the $400,000 claimed at trial) (J. 35). This is but one example of deception practiced by the prosecution on the Court and trial counsel.

dence. The effect of Goberman's post-trial sworn statements we submit, is to unequivocally demolish any factual basis for the critical finding made by this Court to the effect that Milton Parness withheld "approximately $400,000". As aforestated, in actuality, such post-trial sworn statements make it clear that neither Milton Parness and/or the appellant owed Goberman and/or his Hotel even one penny. *Thus, no crime was committed.* The critically fundamental assumption of this Court that Milton Parness withheld approximately $400,000 thus is incorrect in light of Goberman's post-trial statements.

Similarly, a number of letters written by Goberman to the Government, through its prosecutors, erode the second and third fundamental assumptions necessary for the conviction to stand. It will be recalled that those assumptions were that Parness was solely responsible and had exclusive control over marker collections and that the $60,000 seized by the I.R.S. from one Norber, was intended for Parness. In actuality, the letters indicate, inter alia, that Goberman *at the time he testified at trial knew that the $60,000 was not in fact, intended for Parness but was in fact, actually to go to Goberman, himself.* Thus, Goberman wrote to R. J. Campbell, the chief prosecutor, on March 13, 1973 and stated: *

"DEAR MR. CAMPBELL;

LAST WEEK, WHEN I WAS AT YOUR OFFICE, WE DISCUSSED BRIEFLY THE MATTER OF *'SAM NORBER—I R.S.—(MY) $60,000.00—MATTER'*.

YOU TOLD ME THAT YOU WOULD LOOK INTO THIS AND POSSIBLY (ADVISE) SUGGEST THE STEPS I (MUST) SHOULD TAKE IN ORDER TO EFFECT THE RECOVERY OF

* Goberman's letters appear above in capital letters with alternative grammar just as Goberman wrote them; the emphasis however is ours.

THIS MONEY . . . AND . . . SUGGESTED I DROP YOU A LINE AS A REMINDER.

AS I'M ANXIOUS TO GET ALONG ON THIS MATTER I'D APPRECIATE HEARING FROM YOU.

THANK YOU

ALLEN GOBERMAN" (J. 483, 585).

Attached to Mr. Campbell's letter of March 13, was the following notation from Mr. Goberman's diary:

"WELL, HERE I GO STICKING MY NECK OUT AGAIN—MORE HOPES—I GUESS THOSE 'HOPES' KEEP ME GOING—NO 'HOPE—NO NOTHING'—ANY WAY—R.J. I BELIEVE IS TRYING TO HELP —*HE KNOWS* AND HAS THE (MY) RECORDS ETC—TO PROVE THAT THE $60,000—*IS MINE*—
I WONDER IF I'M GOING TO BE THE PATSY —AGAIN—WE'LL SEE—!" (J. 586).

Similarly, on April 27, 1973, Mr. Goberman wrote to Lawrence Leff, etc., special attorney employed as head of Detroit Strike Force by the Department of Justice, sending a copy of his communication to Mr. Campbell:

"DEAR MR. LEFF.

ENCLOSED PLEASE FIND (I.R.S.) FORM #843 WITH EXPLANATORY ATTACHMENT.

AS I DIDN'T RECEIVE INSTRUCTIONS RE: DIRECTION OF MAILING, WILL YOU PLEASE BE GOOD ENOUGH TO GIVE PAPERS TO PROPER PERSON(S).

THANK YOU FOR YOUR (PAST) CO-OPERATION AS WELL, I REMAIN

YOURS TRULY

ALLEN GOBERMAN" (J. 487, 592).

In the I.R.S. Form #843 attached to the Campbell-Leff letter of April 27, 1973, Mr. Goberman wrote:

> "MY NAME IS ALLAN N. GOBERMAN AND I RESIDE AT 104 VILLAGE GREEN LAND, LANCASTER, PH-17604
>
> (PRIOR TO) JANUARY 1971—I WAS THE OWNER OF THE ST. MAARTEN ISLE HOTEL, LOCATED IN ST. MAARTEN NETHERLANDS ANTILLES.
>
> AT THE SAME TIME I WAS THE 'OWNER' OF A GAMING CASINO LOCATED WITHIN THE HOTEL.
>
> SAMUEL NORBER, OF DETROIT MICH., *AS A JUNKETEER OPERATOR, WAS RESPONSIBLE TO COLLECT AND DELIVER TO ME, OR MY DESIGNATED AGENTS, ALL GAMBLING LOSSES OF HIS OWN—HIS PERSONAL ASSOCIATES*—AND THE PEOPLE HE BROUGHT TO THE CASINO ON HIS JUNKETS.
>
> SOMETIME IN JANUARY 1971—SAMUEL NORBER WAS BRINGING $60,000.00 FROM DETROIT—TO—NEW—YORK—*TO BE DELIVERED TO ME*, AS A PARTIAL COLLECTION OF GAMING DEBTS DUE . . .
>
> AT THAT TIME THE $60,000.00 WAS CONFISCATED BY A GOVERNMENT AGENCY AND I WAS THEN INFORMED TO CLAIM THE MONEY AT THAT TIME.
>
> I INITIATED SEVERAL STEPS TOWARDS CLAIMING MY MONEY . . . BUT . . . FOUND THAT I WAS GETTING INTO AREAS THAT COULD BE DANGEROUS TO MY 'WELL BEING'.

MY RECORDS COVERING THE ABOVE FACTS ARE NOT IN MY POSSESSION BUT IN THE POSSESSION OF

ROBERT J. CAMPBELL ESQUIRE
ATTORNEY-IN-CHARGE
STRIKE FORCE 18
ROOM 2722

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON D.C. 20530

THERE ARE MANY, MORE FACTS PERTAINING TO MY CLAIM—BUT I DON'T THINK IT PRUDENT TO DOCUMENT THEM IN THIS LETTER—PLEASE ADVISE ME WHEN I MAY EXPECT THE RELEASE OF THESE FUNDS *TO ME*." (J. 594, 595) (Emphasis supplied).

The import of those letters we submit, is crystal clear and unequivocally undercuts the basis of the indictment. They deal directly with the guilt or innocence of appellant and Milton Parness. The letters indicate that the Norber money was intended to go directly to Goberman; that Campbell had the records to prove it and that Norber was responsible for collecting at least $60,000 in markers due. Thus, Parness could not have been solely responsible for or had exclusive control over marker collections.

In *United States* v. *Slutsky*, 514 F.2d 1222 (1975) this Court recently reiterated most succinctly what a movant must establish to be successful in obtaining Rule 33 relief:

> "To succeed on such a motion a defendant must show, inter alia, (1) that the evidence was discovered after trial, (2) that it could not, with the exercise of due diligence have been discovered sooner, (3) that it is so material that it would probably produce a different verdict. United

States v. Costello, 255 F.2d 876, 879 (2d Cir.), cert. denied, 357 U.S. 937, 78 S.Ct. 1385, 2 L.Ed. 2d 1551 (1958), citing Berry v. State, 10 Ga. 511, 527 (1851)."

See also *United States* v. *Stofsky*, — F.2d — (2d Cir., 11/7/75, Dkt. No. 74-1860) and the cases cited therein.

We submit, that on the basis of the requirements enumerated in *Stofsky* and *Slutsky*, the appellant must succeed. Clearly, Goberman recanted his trial testimony concerning the $400,000 at a post trial civil deposition. This evidence was clearly discovered after trial and could not, with the exercise of due diligence have been discovered sooner. Moreover, it is crystal clear that the truth was known to the prosecutors who inexplainably remained silent. That it is so material that it would probably produce a different verdict is doubtless established by the fact that this Court considered Goberman's trial testimony to the effect that his Hotel "failed to receive approximately $400,000 in overdue markers" as a critical underpinning of its own opinion affirming the judgments of conviction.

Similarly, since the letters heretofore referred to herein were addressed from Goberman to the Government, through its prosecutors, who never turned the same over to the defense or made them available to the Court below *in camera*, they could not with the exercise of due diligence have been discovered sooner.*

That the letters are so material as to probably produce a different verdict is once again established by the

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* See Point II, *infra*, wherein it will be contended that in not turning over the letters and other exculpatory evidence referred to herein, the prosecutors committed misconduct of the gravest consequences, violated 18 U.S.C. 3500, and the holding of *Brady* v. *Maryland*, cited *supra*.

fact that this Court considered Goberman's trial testimony to the effect that the $60,000 was intended for Parness and not himself as a further critical underpinning of its own opinion affirming the judgments of conviction.

The letters further demonstrate that inasmuch as Goberman and Norbor were collecting their own "markers", Parness could not have had exclusive control over marker collections.

It is anticipated that the prosecution will argue that the newly discovered evidence disclosed for the first time in civil depositions taken subsequent to the trial and by the Government during the subsequent course of these proceedings was in fact not new but available to the defense at the time of trial. This position is untenable inasmuch as the new evidence had as its genesis the Goberman concession that several deductions had to have been made from the gross win of the Casino; that he had failed to credit the Parness account with a number of checks received by Goberman in December 1970 and January 1971; and that the letters were written prior to the trial but concededly not produced until after the trial.

The Government's stance in the Court below that the Goberman concession was merely a verbalization of the Government's Exhibits 167 through 177 is untenable. Those exhibits which appear largely in the coded handwriting of Goberman could not have been challenged even by skilled *counsel* until Mr. Goberman gave the defense the key to that code in his civil depositions.*

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* As discussed in Point IV *infra*, the prosecution did in fact have that key at the time of trial but suppressed the same. Moreover despite a blistering cross-examination, Goberman at trial refused to provide the defense the keys to Exhibits 167-177.

POINT II

The Court Below Erred In Refusing To Grant The Appellant A New Trial In View Of The Prosecution's Deliberate Non-Disclosure Of Exculpatory Material And Material Producible Under 18 U.S.C. 3500. In Any Event, The Court Below, In View Of The Government's Admission Of Non-Disclosure, Should have Granted Appellant An Evidentiary Hearing On The Issue Of "Deliberateness".

Subsequent to trial the appellants learned of the existence of a series of 26 letters written by Alan Goberman to various members of the prosecution team in charge of the instant case.*

The Government conceded its failure to disclose the letters although they had been aware of a number of them since December 1973, but maintained that the failure to disclose the written communications was inadvertent. Campbell in fact failed to submit any affidavit or offer any explanation for the nondisclosure of these letters.

Without seeking an exposition of the facts or even proper responsive affidavits surrounding non-disclosure in an "adversarial context", the Court found that "the Government's nondisclosure of those letters was inadvertent") (J. 559).

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* The Court below in its written opinion denying Appellants' Motion found: "The letters written by Goberman were each written to Department of Justice Attorneys who were not involved in the trial or its preparation". (J. 559) In fact perusal of the letters reveals that almost all of the letters (or copies thereof) were sent to R.J. Campbell and/or Harold McGuire, the attorney in charge of this prosecution and the trial attorney respectively.

We respectively submit that inasmuch as the Goberman letters constituted both Jencks Act Material (18 U.S.C. 3500), and evidence favorable to the defense the District Court was compelled to conduct a hearing in an "adversarial context" on the issue of inadvertence and upon such hearing to grant a new trial. *United States* v. *Hilton*, 521 F.2d 164 (2d Cir., 1975).

18 United States Code, Section 3500 provides, in relevant part, as follows:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * * *
>
> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to and witness called by the United States, means—(1) a written statement made by said witness and signed or otherwise adopted or approved by him; . . ."

It is undisputed that a number of the letters dealt with $60,000 being transported from Detroit to New York ("the Norber Transaction") and that the "Norber Transaction" related generally to the events and activities testified to in Goberman's direct testimony. The Goberman letters are thus clearly Jencks Act or 3500 Material. See *United States* v. *Badalamente*, 507 F.2d 12, 17-18 (2d Cir., 1974).

The Legal standards to be applied in determining whether a new trial should be granted on governmental non-disclosure of Jencks Act material is now well settled in this circuit. See, *United States* v. *Hilton*, *supra*, and the cases cited therein. Thus, if the Government *deliberately* suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is *merely material or favorable to the defense.** *United States* v. *Hilton*, *supra; United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1972); *United States* v. *Keogh*, 391 F.2d 138, 146-47 (2d Cir., 1968); and *United States* v. *Morell*, — F.2d — (2d Cir., 8/29/75, Docket # 74-1827, slip op. 5873, 5879). If on the other hand, the Government's failure to disclose is merely inadvertent or negligent, a new trial is required if there is a significant chance that this added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid conviction. *United States* v. *Rosner*, 516 F.2d 269, 273 (2d Cir.); *United States* v. *Morell*, *supra; United States* v. *Seijo*, 514 F.2d 1357, 1364; *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir., 1974); and *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir., 1969).

In the instant case, the "Goberman letters" were both material and favorable to the defense. They undercut several of the major premises made by the Government on trial and of this Court on the direct appeal. Moreover, the concession of the Government that it possessed those letters as early as December, 1973, leads to the inescapable conclusion that the suppression was deliberate. Consequently a new trial should be ordered.

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* Deliberateness has been equated with gross negligence. See, *United States* v. *Miller*, 411 F.2d 825 (2d Cir., 1969); *United States* v. *Consolidated Laundries*, 291 F.2d 563 (2d Cir., 1961).

The holding of the Court below, that the failure to disclose was "inadvertent" was apparently predicated upon the belief that "the Affidavits submitted by McGuire and Dowd establish that each was unaware of the existence of those letters which were in an administrative file in Washington, D.C., over which neither had control or responsibility" (J. 559-560). This assumption, we submit, has absolutely no basis in fact and is patently erroneous. Moreover, it fails to recognize that the affidavit of R. J. Campbell the recipient to most of the letters, is wholly silent on this subject (J. 454).

As indicated by the affidavit of Michael Pollack a member of the Strike Force in the Eastern District of New York, (which the Court below unfortunately elected to disregard) R. J. Campbell, Mr. Dowd's supervisor and Mr. McGuire were fully aware of Goberman's "complaints as embodied in his letters." Indeed Pollack's affidavit makes it crystal clear that on several occasions he attempted to arrange a meeting between Goberman and Campbell so that a face to face confrontation could be had regarding Goberman's written complaints (J. 452-453).

Finally, perusal of those letters *not expressly* directed to members of the prosecution team reveal that they were written at the direction or suggestion of members of the team. Under these circumstances, one is hard-pressed to find an example of a more deliberate non-disclosure.

In any event, it is crystal clear that where as here, there is an issue of deliberateness versus neglect, a plenary hearing ought to be ordered unless the Court below finds that a new trial is warranted regardless of the Government's conduct. *Cf. United States* v. *Seijo, supra,* and *United States* v. *Badalamente,* 507 F.2d 12, 15 (2d Cir., 1974).

In *United States* v. *Hilton, supra,* a case remarkably similar to the one at bar, the prosecution had failed to divulge a letter written by one of its key witnesses to the prosecutor. In the letter the witness Avon White wrote asking the United States Attorney for help transferring him from one prison to another. This Court, at the suggestion of the Government remanded the case for an evidentiary hearing on the issue of deliberateness. After a hearing during which Hilton was not adequately represented by counsel, the District Court denied his motion for a new trial. This Court reversed and held:

> "However, the issue before us is more than reviewing the trial court's determination of whether a reasonable doubt would have been induced in the jurors. Before we can apply the reasonable doubt standard we must determine whether the trial court was correct in concluding that the suppression was inadvertent. *Our interest in enforcing the prophylactic rule requiring that a new trial be granted in cases of deliberate nondisclosure dictates that the facts surrounding the nondisclosure be developed in an adversarial context*" (emphasis supplied).

See also, *United States* v. *Morell, supra.*

In *United States* v. *Pacelli,* 491 F.2d 1108 (2d Cir., 1973), the prosecution found itself in a position similar to the one in the instant case. In *Pacelli,* the prosecution urged, as here, that the failure to disclose *letters* written by its chief witness to one of the prosecutors was inadvertent and therefore harmless error. This Court disagreed and held:

> "(9) Accepting the government's assertion that these nondisclosures were inadvertent, we cannot

> agree with its characterization of them as "harmless error." Although appellant's counsel possessed an abundance of impeaching material which he exploited at trial, none of this information conveyed quite so forcefully as Lipsky's letter to Morvillo the desperate state of Lipsky's mind after he had caused a mistrial by perjuring himself in the previous narcotics prosecution against Pacelli. The letter, furthermore, contains a blatant lie to the effect that his perjury, which caused the mistrial, had been unintentional rather than deliberate. Appellant's counsel would probably have sought to make this letter the "capstone" of his attack on Lipsky's credibility, *cf. United States* v. *Miller*, *supra*, and argued that it revealed a frantic—even mentally disturbed—person who was ready to tell any lie to anyone in order to save himself from a murder conviction in the state court. Denial of the opportunity to use such forceful impeaching material bearing on the credibility of the government's key witness mandates a new trial." (Footnotes omitted) (*Pacelli*, 491 F.2d at 1119).

So, too in the instant case, the defense could have used the "Goberman letters" as one of the "capstones" of its cross-examination to demonstrate that Goberman had lied when testifying that he did not conduct junkets; that the Norber $60,000 was intended for Parness; and to demonstrate that members of the prosecution were aiding Goberman in his quest of the $60,000 (see A. 74 *et seq.*).

Moreover, much of the information contained in the Goberman letters was of high value to the defense and belied the cornerstone of the Government's theory—eg.

that Parness was the exclusive collector of markers. See *United States* v. *Parness*, 503 F.2d 430, 436-437.*

It is anticipated that the Government will urge that many of these letters were directed to R. J. Campbell, who did not sit at counsel table throughout the trial and to Michael Pollack who apparently initiated the investigation in the Eastern District of New York. Therefore the trial attorney's failure to disclose had to be inadvertent.**

This position is highly untenable. Campbell was in charge of the prosecution and sat at counsel table during Goberman's testimony. Pollack was intimately familiar with the details of the case and the chief witness. Both were experienced prosecutors who presumably knew of their obligation under *Brady* v. *Maryland*, *supra*. As noted by Judge Friendly in his dissent in *Morell*, *supra*.

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* Several other letters written by Goberman were also highly material. For example, in one of his letters Goberman sought R. J. Campbell's aid in avoiding a deposition in a civil suit brought by Goberman's associate at the Hotel. In his letter, Goberman expresses the fear that his adversary would make "mincemeat out of me". Compare with *United States* v. *Hilton*, *supra*. The letters also reveal that Goberman expected help from the prosecutors, particularly R. J. Campbell in recovering "his" $60,000; that contrary to the "hate" Goberman expressed for the prosecutor at trial, he was willing to do anything for them and in fact had a friendly relationship; that Goberman was in a desperate mental state and almost had a heart attack; and finally, that Goberman lied during his testimony. A detailed analysis of these letters is contained in the brief submitted on behalf of the appellant, Milton Parnss. In sum, however, the letters taken together demonstrate that Goberman was under extreme pressure to testify whether truthfully or not and that he was either a liar or deranged.

** Cf. *United States* v. *Duardi*, 384 F. Supp. 861 (Dc.W.D. Mo. 1973) expressly discussing the relationship between the Strike Force and the local United States Attorney's Office and imputing knowledge of one agency to the other.

> "It is high time that United States Attorneys in this circuit took effective means to heed the Chief Justice's admonition in *Giglio*, *supra*, 405 U.S. at 154, that, to the extent that requiring the right hand to know what the left hand is doing "places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." This should be particularly easy when, as in this case and many others, the material concerns the prosecution's chief witness. An appellate court is naturally reluctant to reverse on *Brady* grounds after long trials where guilt seems clear and the value of the withheld material is dubious. But we should never forget Judge Frank's famous remarks about the salutary effect inherent in a reversal and a direction of a new trial, as distinguished from repeated admonitions." (*Morell*, Slip Op. p. 5888.)

In sum, applying the prophylactic rule of this circuit with respect to nondisclosure of evidence, this Court should order a new trial or in the alternative, remand for a full adversarial hearing on the issue of deliberateness and materiality.

POINT III

The Failure Of The Prosecution To Disclose Certain Promises Made To Its Witness-In-Chief Mandates The Granting Of A New Trial. In Any Event, A Hearing Is Required In View Of The Sworn Factual Differences Between The Prosecution's Agents And Its Chief Witness.

Subsequent to the initiation of appellant's motion for a new trial, Allan Goberman in two unrelated proceedings, one apparently under oath, stated in unequivocal language that the Government had promised to help him get his hotel back.

On February 24, 1975, in Newark, New Jersey, he informed United States District Court Judge Curtis Meanor that:

> "The reason why your Honor, I brought my claim under section 1964, and I may be as you explained it, wrong is the fact that the *United States Government was supposed to have sued for the recovery under that act and to have recovered the hotel and return it to me, and I'm trying to put myself in their position.*" (J. 345-346) (Emphasis supplied.)

Any ambiguity in Mr. Goberman's statement to Judge Meanor is negated by his apparently sworn statement contained in a formal complaint in an action entitled *Goberman* v. *United States*, (D.C. E.D. Pa., 12/18/74) (J. 530-551), in which Goberman seeking $7,000,000 in damages from the Government, apparently for "breach of promise" * alleges in paragraph "70" of his complaint:

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* The Court below, found that Goberman's statement to the District Court in New Jersey "reveals only that the statements are

[Footnote continued on following page]

> "Robert J. Campbell Esquire, Chief Strike Force 18, Washington, D.C., advised plaintiff that Quote: *'The Government wants to convict the racketeers who stole the Hotel away from you and have it returned to you'.*" (J. 549, Emphasis supplied).

Faced with the clear allegations of a critically important promise, the Government submitted the affidavits of Harold McGuire, John Dowd, Michael Pollack and R. J. Campbell. These affidavits are noteworthy more for what they do not say, then for what they say. For example, Mr. McGuire denies making any promises only since his association with the prosecution in the spring of 1973. He further limits his denial to cover attorneys employed within the Southern District of New York (J. 447). Mr. Pollack denies any personal promises but acknowledges that Mr. Goberman repeatedly claimed that Mr. Cambell and others were mistreating him (J. 447). Similarly, Mr. Dowd's denials are extremely limited.

Significantly each of these affidavits tacitly points a finger at R. J. Campbell, the attorney in charge of the overall prosecution of the appellants. Mr. Campbell, in his best "Watergate" argot indicates that "to the best of his present recollection" no promises were made to Mr. Goberman (J. 454).*

Clearly Goberman, if not the prosecutors—believed that the quid-pro-quo for his trial testimony was the promise by the government that he would ultimately be assisted by the government in regaining his Hotel. By disputing Goberman's contention that he was, in fact,

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ambigious and that Goberman did not understand the legal status of the Casino-Hotel . . ." (J. 558-559). Unfortunately the Court below totally ignored the allegation in Goberman's complaint against the Government (J. 549).

* Parenthetically, the silence of Messers Friedman and Glaze, the prosecution's investigators is deafening.

promised anything, the Government still does not overcome the crucial fact that when Goberman testified at trial he believed he would be the beneficiary of the Government's promises. One thing is, however, clear: as a result of the Government's actions, through its prosecutors, the defense was deprived of a time-honored technique for testing the credibility and veracity of this most important witness and probing his subjective state of mind at the time he testified. Since the reliability of the testimony of Goberman was, of necessity, determinative of the guilt or innocence of Milton Parness and the appellant, we submit, a new trial is warranted by virtue of the fact that the Government failed to make the defense—or even the Court below aware of the promises—or at the very least, what Goberman obviously believed the Government's representations to be. *Giglio* v. *United States*, 405 U.S. 150 (1972); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *United States* v. *Seijo*, 514 F.2d 1357 (2d Cir. 1975); *Brady* v. *Maryland*, 373 U.S. 89 (1963). Nor does it matter whether the Government's non-disclosure was as a result of negligence or design. *Giglio* v. *United States*, at p. 154; *Washington* v. *Vincent*, Docket #75-2100 (2d Cir., Nov., 1975). (Cf. *Demarco* v. *United States*, — U.S. —, 94 S. Ct. 1184 (1974).

In short, the Government, through its prosecutors, knew or should have with due diligence known about the promises made to Goberman or at least what Goberman considered to be the quid-pro-quo for his trial testimony. These facts should have been then disclosed to the defense. Certainly, it is indisputable that Goberman had made his understanding of the quid-pro-quo for his trial testimony known to Pollack who, in turn, had made it known to at least Campbell and McGuire. As such, the Government should not have made a unilateral determination as to Goberman's state of mind when in fact, there was irrefutable empirical evidence to establish that at the time he

testified Goberman believed he would be the beneficiary of the Government's promises and that the Government knew, or should have known with due diligence of Goberman's subjective beliefs. As this Court stated in *United States* v. *Rosner*, 516 F.2d 216 (2d Cir. 1975):

> "We think the United States Attorney's office erred seriously in failing to notify the defense about the Lawrence situation. Appellant is right that the prosecutor should not have made a unilateral determination of the credibility of Lawrence when Lawrence was allegingly fitting into the very pattern of conduct suggested by appellant's motion." (516 F.2d at p. 281 (2d Cir., 1975)).

POINT IV

The Prosecution's Suppression Of Evidence, Including Its Chief Witness's Perjury, Which Tended To Exculpate The Appellants, Requires The Granting Of A New Trial.

Subsequent to the trial of this action, the defense learned that notwithstanding its pre-trial request for evidence favorable to the defendants, the prosecution had suppressed certain information (both oral and written) which, in fact, was highly exculpatory, (e.g., that Parness had paid a substantial amount of money to Goberman in late 1970 and early 1971 which should have been credited against Parness' "marker collections"; that there were three legitimate deductions from the alleged "gross marker collections" that Parness was entitled to make, and that the so-called $400,000 in marker pick-ups in fact amounted to only $233,000. Moreover, given the fact that the prosecution possessed a number of letters written by Goberman, it must be inferred that the prosecution had to know that Mr. Goberman was committing

serious perjury on both his direct and cross-examination in the instant trial. The suppression of these letters which undercut the basic premises on which the prosecution is based, mandate the granting of a new trial.

It is now well established that the suppression of evidence faborable to an accused amounts to a denial of due process of law. *Mooney* v. *Holohan*, 294 U.S. 103 (1935). *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *Giles* v. *Maryland*, 386 U.S. 66 (1967). Compare *United States* v. *Pfingst*, 490 F.2d 262, 277 (2d Cir., 1943).

A new trial is required even where the suppression concerns only the credibility of a witness and not the facts directly in issue. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Miller* v. *Pate*, 386 U.S. 1 (1967); *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135 (1964) and *United States* v. *Keogh*, 391 F.2d 138 (2d Cir., 1968).

The holding of Napue was extended by this Court first in *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir., 1969) and later in *United States* v. *Miller, supra.* These two cases read together hold that the prosecution has a duty to disclose exculpatory evidence quite apart from any request by the defense on the basis that the facts withheld may be evidence whose high value to the defense could not have escaped the prosecutor's attention notwithstanding that the suppression may have been negligent. *United States* v. *Consolidated Laundries* at page 571. See also *United States* v. *Heath*, 147 F. Supp. 877 (D.C.D. Hawaii), appeal dismissed 260 F.2d 623 (9th Cir.) and *People* v. *Savvides*, 1 N.Y. 2d 554, 557 (1956).

In the *Consolidated Laundries* case, this Court stated:

> "Through unexplained acts, certain of the papers in the Government's custody were misplaced and consequently were not shown to defendants when

> inspection was ordered. This failure to produce deprived the defendants of evidence which would have been helpful to them on points which the findings show were of great importance in determining their guilt.
>
> Although no authoritative case precisely in point has been called to our attention, the appellants' citations tend to support the conclusion that the negligent suppression of material evidence by the Government entitles a defendant to a new trial."

In *Miller*, the defendant stood convicted on conspiring to import heroin in violation of 21 U.S.C. 173-174. His conviction was affirmed, 381 F.2d 529 (1967) and certiorari was denied. Thereafter the defendant moved on four separate occasions for a new trial. The last of these motions alleged that the prosecutor had failed to disclose to the defense a pre-trial hypnosis of its principal witness.

In reversing the District Court's denial of the motion for a new trial, the Circuit Court held:

> "Developments during the trial placed a duty on the Government to disclose the hypnosis; that where such a duty has not been discharged a motion for a new trial must be granted if there is a significant possibility that the undisclosed evidence might have led to an acquittal or hung jury; and such a possibility exists here.
>
> Even if he (the prosecutor) did not recall the hypnosis or remember or locate his memorandum of it, he should have, and *negligence of the prosecutor in failing to make evidence available to the defense reduces the standard of materiality needed to require the granting of a new trial below in the formulations applicable where no prosecutorial misconduct exists.*" (Emphasis supplied.)

Thus, the conclusion is inescapable that if the defense can show that the Government suppressed the evidence a new trial is warranted if the evidence is merely material or favorable to the defense, *Giglio* v. *United States*, 405 U.S. 150, 153 to 154 and *United States* v. *Kahn*, 472 F.2d 272 287. The same rule applies whether or not the suppression is intentional if it appears that the value of the undisclosed evidence could not have escaped the intention of the prosecutor. *United States* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969); *United States* v. *Miller*, *supra*.

In the instant case, it cannot be seriously argued that the evidence aforementioned did not have a high value to the defense. If disclosed, there would have been demonstrative evidence before the jury that the defendants did not owe Mr. Goberman $350,000 to $400,000 as testified to by him, but in fact nothing, ergo, they could not have converted a portion of that money, to wit: the $160,000. See *Grant* v. *Alldredge*, 498 F.2d 376 (2d Cir. 1974). Consequently, the mainstay of the prosecution would have fallen and with it the conviction.

In addition, the failure to disclose the letters and their contents foreclosed the defense from establishing that so-called Norber money was intended for Goberman and not Parness; that Parness was not the sole and exclusive collector of markers; and that in fact Norber and his companion Selig had outstanding markers due the Casino in excess of $150,000 (J. 588).

It is anticipated that the prosecution will argue that the missing information was not material and it may also urge that the matter had been delved into on Mr. Goberman's cross-examination was known to the defense and that therefore this new evidence could have made no perceptible difference to the jury. This position is untenable inasmuch as cross-examination was not effective as a

result of defense counsel's lack of the requested exculpatory material and the suppressed information contained an abundance of data (e.g. the letters) which would show that not only did the witness perjure himself before the jury in the instant case, but that the Parnesses in fact owed no money to Goberman or the casino. Mere knowledge of this information would have revealed to the prosecutor the high value to the defense. (*See United States ex rel. Washington* v. *Vincent*, — F.2d — (2d Cir., 11/5/75, Dkt. No. 75-2100), Slip Op. 373 et seq.).

In *Washington*, a state prosecutor remained silent when during the cross-examination of the States chief witness, that witness lied with respect to promises which had been made in return for his testimony. The State Appellate Courts in divided opinion refused to grant coram nobis relief, notwithstanding their finding that the prosecutor had been guilty of "gross impropriety". This Court, reversed and granted petitioner Habeas Corpus relief holding that:

> "The knowing use by a State prosecutor of perjured testimony ordinarily results in a deprivation of fundamental due process, violating the Fourteenth Amendment and requiring a new trial. Whether the State solicits the false testimony or merely allows it to stand uncorrected when it appears does not diminish the viability of this principle nor does the rule lose force because the perjury reflects only upon the credibility of the witness." (*United States ex rel. Washington* v. *Vincent*, Slip Op. at p. 383-384, citations omitted.)

Moreover, in *Washington*, this Court addressed itself to the fact that defense counsel may have been aware of the witness' perjury. The Court, however, rejected that argument holding that:

> "The harm in the present case was caused not so much by unawareness that Anderson's testimony may have been perjured as by inability to respond effectively in view of Levine's (the prosecutors) silence." (*Washington, supra*, Slip op. p. 386, Footnote 9.)

In the instant case, although Goberman was subjected to a blistering cross-examination on both the issue of the "missing" $400,000; the issue of what deductions should be taken therefrom and the so-called Norber money he continued to maintain the story he had narrated on direct examination, a story we now know to be untrue—a story the prosecution knew to be false. Consequently, defense counsel in the instant case found themselves in a situation precisely the same as that which existed in *Washington.*

It is respectfully submitted that the dignity of the United States should not permit the conviction of any person on tainted testimony. Here, the appellant's conviction is tainted because the prosecution failed to disclose highly exculpatory evidence and there can be no other just result than to accord her a new trial.

To paraphrase the Supreme Court's opinion in *Brady* v. *Maryland, supra*, society must bear the defendants' awful loss because the system of justice imposed upon them was fundamentally unfair. See also *United States* v. *Bonanno*, 430 F.2d 1060, 1063 (2d Cir.), *cert. denied*, 400 U.S. 1964 and Note, "The Prosecution's Constitutional Duty to Reveal Evidence to The Defendant, 74 Yale L.J. 136, 145-147, 1964."

CONCLUSION

It Is Respectfully Submitted That The Judgment And Order Appealed From Should Be Reversed And A New Trial Granted Or In The Alternative, That This Case Be Remanded For A Full Evidentiary Hearing.

Respectfully submitted,

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